In the Supreme Court of the United States

OCTOBER TERM, 1964

No. 996

GREGORY COMULADA, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a–8a; R. 69–75) is reported at 340 F. 2d 449.

JURISDICTION

The judgment of the court of appeals was entered on January 15, 1965 (R. 76a). On February 12, 1965, Mr. Justice Harlan extended the time for filing a petition for a writ of certiorari to and including March 16, 1965, and the petition was filed on that date. The jurisdiction of the Court is invoked under 28 U.S.C. 1254(1).

769-173—65

QUESTIONS PRESENTED

1. Whether a government agent's destruction of notes, after the subject matter covered therein had been incorporated into his official report, required that his trial testimony be striken under 18 U.S.C. 3500(d).

2. Whether testimony by government agents as to their knowledge of the whereabouts of an informer was so inconsistent with testimony by another agent at a later trial as to justify the conclusion that petitioner was denied a fair trial.

STATEMENT

Petitioner was found guilty by a jury in the United States District Court for the Southern District of New York of selling narcotics in violation of 21 U.S.C. 174. As a second offender he was sentenced to imprisonment for 15 years (Pet. App. 2a; R. 1a). On appeal the conviction was affirmed (R. 76a).

A. *Narcotics sale*—Narcotics agent Coursey testified that on December 20, 1961, a special employee, Saul Scott, introduced him to petitioner as his "cousin Irving" from Philadelphia (R. 2a–3a, 13a–14a). Coursey said that he wanted to buy two ounces of heroin and paid petitioner $1,000. After petitioner made a telephone call, he told Coursey and Scott to take a ride down the street and then return (R. 3a–4a). When they did return, petitioner handed a brown paper bag containing heroin to Coursey, who was seated in his car (R. 4a–5a, 13a). Agent Leya gave corroborating testimony concerning surveillance of the movements of Coursey and Scott (R. 18a–19a).

B. *Destruction of agent's notes*—After cross-examination of agent Coursey began, the government made available to the defense his formal report of the incident (Gov. Ex. 6) and his daily report. Coursey testified that he made notes on 3″ x 5″ index cards which he destroyed when he made the report (R. 6a). Coursey said that, although he referred to his notes in making the report, he did not actually need them, since the report was his own independent recollection of what occurred on December 20, 1961 (R. 8a). Though aware of 18 U.S.C. 3500 before he destroyed the notes, Coursey stated he did not know that if the case went to trial defense counsel would ask for production of the notes (R. 15a). In answering the government attorney's question as to his custom in dealing with notes, Coursey testified, "If I made handwritten notes, when I formulated the memorandum report, I would incorporate everything in the handwritten notes in the memorandum report, and therefore, I needed the notes no longer" (R. 16a). The court denied a defense motion for a further hearing on the question of the destruction of the cards on the ground that examination of the witness had not established a sufficient basis for further inquiry (R. 8a–10a, 16a–17a). At the close of the government's case the court also denied a defense motion to strike Coursey's testimony on the ground that his destruction of the notes was a violation of 18 U.S.C. 3500(d) (R. 23a–26a).

C. *Whereabouts of informer*—The trial in the instant case began on October 1, 1962 (R. 1a). Agent Coursey testified that he had last seen Scott in Feb-

ruary, 1962; that he had no idea as to his present whereabouts; and that Scott had worked primarily with agent Leya (R. 11a, 14a). Leya testified that the last time he had seen Scott was in February, 1962. According to Leya's best knowledge, that was the last time Scott had been in touch with the Bureau of Narcotics (R. 19a, 21a). Leya further testified that in late September, 1962 he had inquired of agent Costa, who had last communicated with Scott, as to the informer's whereabouts; that Leya then inquired about Scott at "his last address," the Manhattan Towers Hotel; and that Scott no longer resided there (R. 21a).

At the trial of John Cimino and Joseph D'Ercole in the Southern District of New York, which began on November 16, 1962—about a month and a half after petitioner's trial[1]—narcotics agent Costa testified that he had last seen Scott at the end of August or early September, 1962 (R. 27a, 28a). The last time Scott was used as a special employee was in August 1962, at which time Costa had paid him for his services (R. 29a–30a). In early October 1962 Scott tried to telephone Costa at his office, but Costa was not in (R. 29a). Also in October, Costa was unable to reach Scott by telephone calls to the Manhattan Towers Hotel, and did not find him in his hotel room (R. 31a). The hotel manager testified that Scott had lived there from October 12, 1961 until the date of the manager's testimony on November 19, 1962, but that from the

[1] See *United States* v. *Cimino*, 321 F. 2d 509, 515–516 (C.A. 2) (dissenting opinion), certiorari denied, 375 U.S. 974.

early part of 1962 Scott was registered under the name of "Fields" (R. 32a–36a).

ARGUMENT

1. Agent Coursey's good faith destruction of his notes after their subject matter had been incorporated in his official report did not require that his trial testimony be stricken under 18 U.S.C. 3500(d). Cf. *Killian* v. *United States*, 368 U.S. 231, 241–242; *United States* v. *Aviles*, 337 F. 2d 552, 559–560 (C.A. 2), certiorari denied *snub. nom. Gigante* v. *United States, et al.*, Nos. 680, etc., O.T. 1964, March 1, 1965; *United States* v. *Greco*, 298 F. 2d 247, 249–250 (C.A. 2), certiorari denied 369 U.S. 820; *United States* v. *Crosby*, 294 F. 2d 928, 950–951 (C.A. 2), certiorari denied *sub nom. Mittelman* v. *United States*, 368 U.S. 984; *United States* v. *Thomas*, 282 F. 2d 191, 194 (C.A. 2). The notes were merely used as an aid in transferring the subject matter of the notes to the memorandum report. There was no apparent need to preserve them after they had served that purpose. In any event, petitioner suffered no prejudice since the report was furnished to his counsel at trial for appropriate use on cross-examination of the agent.

2. There is no substance to petitioner's contention that he was denied a fair trial because the testimony of agents Coursey and Leya to the effect that the informer Scott was unavailable was misleading and inconsistent with agent Costa's testimony at the later *Cimino* trial. Costa's testimony at the *Cimino* trial showed that Scott worked for the government later than Leya believed. Costa did testify that in Octo-

ber 1962 when he telephoned and went to the Manhattan Towers Hotel to look for Scott he was unable to locate him. At petitioner's trial Leya testified that, after getting Scott's address from Costa in September, he went to Manhattan Towers and was unable to find Scott. Thus, on the significant fact of knowledge of Scott's whereabouts in September and October, there was no inconsistency.

There was no reason for the agents to have made a thorough and diligent search for Scott. At no time did petitioner's counsel state that he wanted Scott called as his witness, as a government witness, or as the court's witness. Nor did petitioner's counsel make an inquiry of his own at the Manhattan Towers Hotel as to the whereabouts of Scott.[2] There is no showing, moreover, as to any testimony that Scott might have given to establish petitioner's innocence.[3] It is apparent that petitioner never intended to insist upon having Scott produced as a witness, and his complaint that this was not done is mere afterthought.

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[2] In *Cimino* defense counsel made his own inquiry at the Manhattan Towers Hotel to learn that Sapp, an alias for the informer Scott, still resided in room 405, under the name "S. Fields" (321 F. 2d at 516).

[3] The court below pointed out that even if petitioner had proceeded under Rule 33, F.R. Crim. P., for a new trial on the ground of newly discovered evidence, he would not have succeeded, there being no specific allegations, under petitioner's version of the facts, directly pointing to his innocence (Pet. App. 6a–7a).

CONCLUSION

For the reasons stated it is respectfully submitted that the petition for a writ of certiorari should be denied.

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